JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

Edwin ak Omang & Anor v Jemin ak Longun

HIGH COURT (KUCHING) — SUIT NO KCH-22–1 OF 2009-I
RHODZARIAH BUJANG J
31 DECEMBER 2013

Contract — Specific performance — Whether remedy precluded — Plaintiff applied for specific performance of sale and purchase agreement ('SPA') to buy defendant's land — Evidence showed specific performance already been granted earlier to another buyer to whom defendant contracted to sell same land — Whether court precluded from granting specific performance to plaintiff unless earlier order set aside — Whether defendant could be ordered to refund all monies received from plaintiff

The first plaintiff in the instant action claimed for specific performance of an agreement to buy a piece of land from the defendant and sought an order that the land be transferred to his nominee, the second plaintiff. The evidence revealed that prior to his agreement with the first plaintiff the defendant had agreed to sell the same land to one Patimah bt Leman ('Patimah'), who had already obtained an order for specific performance of that agreement. The defendant contended that the first plaintiff was mistaken about the identity of the land that was agreed to be sold to him; that it was not the same land he had agreed to sell to Patimah. The defendant also denied that he had received the full purchase price for the land from the first plaintiff.

Held, dismissing the claim:

(1) What the defendant did in selling the land to multiple buyers was despicable and disgusting. However, the granting of specific performance in favour of the plaintiffs was out of the question. There was simply no room for two court orders ordering specific performance of the sale of the same piece of land to two different persons to co-exist. The judgment in default in favour of Patimah was made earlier in time and until that judgment was set aside the court had to defer to it (see paras 10 & 20).

(2) Under cl 4(a) of the defendant's sale and purchase agreement with the first plaintiff, which provided that the agreement was to be rescinded if the land was not alienated to the defendant within three years, there was a condition that the defendant 'shall refund to the purchaser all sums of money received ...'. The defendant did not do so and not having complied with his obligation under that clause, he could not be allowed to now plead rescission of the agreement as a defence. There was credible evidence to support the fact that a sum of RM128,750, and not just the full purchase price of RM102,200, had been paid to the defendant. The

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

defendant's denial of ever having received the full purchase price from the first plaintiff was baseless (see paras 16 & 19).

(3) Given the clear description of the land in the sale and purchase agreement and the defendant's own statutory declaration pertaining to the sale of the land to the first plaintiff, the defence of mistake was pure fabrication. The defendant did not adduce any credible evidence to show that he meant to sell any other piece of land other than the one in question, to the first plaintiff (see paras 15 & 17).

[Bahasa Malaysia summary

Plaintif pertama dalam tindakan ini menuntut untuk pelaksanaan spesifik perjanjian untuk membeli sebidang tanah daripada defendan dan memohon perintah bahawa tanah dipindahkan kepada pehamanya, plaintif kedua. Keterangan menunjukkan bahawa sebelum perjanjiannya dengan plaintif pertama, defendan telah bersetuju untuk menjual tanah yang sama kepada seorang yang bernama Patimah bt Leman ('Patimah'), yang telah memperolehi perintah untuk pelaksanaan spesifik perjanjian tersebut. Defendan berhujah bahawa plaintif pertama tersilap mengenai identiti tanah tersebut yang dipersetujui untuk dijual kepadanya; bahawa ia bukan tanah yang sama yang mana dia bersetuju untuk menjualnya kepada Patimah. Defendan juga menafikan bahawa dia menerima harga belian penuh untuk tanah tersebut daripada plaintif pertama.

Diputuskan, menolak tuntutan:

(1) Apa yang dilakukan oleh defendan dalam menjual tanah tersebut kepada beberapa pembeli adalah keji dan hina. Walau bagaimanapun, pemberian pelaksanaan spesifik yang memihak kepada plaintif-plaintif tidak boleh dipersoalkan. Tiada ruang bagi dua perintah mahkamah memerintahkan pelaksanaan spesifik jualan tanah yang sama kepada dua orang yang berlainan untuk wujud bersama. Penghakiman ingkar yang memihak kepada Patimah telah dibuat lebih awal dalam masa dan sehingga penghakiman tersebut diketepikan, mahkamah terpaksa mengikut kepadanya (lihat perenggan 10 & 20).

(2) Di bawah klausa 4(a) perjanjian jual beli defendan dengan plaintif pertama, yang memperuntukkan bahawa perjanjian dibatalkan jika tanah tidak dipindahkan kepada defendan dalam masa tiga tahun, terdapat syarat bahawa defendan 'shall refund to the purchaser all sums of money received ...'. Defendan tidak berbuat sedemikian dan dengan tidak mematuhi tanggungjawabnya di bawah klausa tersebut, dia tidak dibenarkan untuk sekarang memplid pembatalan perjanjian sebagai pembelaan. Terdapat keterangan yang boleh dipercayai untuk menyokong fakta bahawa jumlah sebanyak RM128,750, dan bukan harga belian penuh sebanyak RM102,200, dibayar kepada defendan.

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

Penafian defendan bahawa pernah menerima harga belian penuh daripada plaintif pertama adalah tidak berasas (lihat perenggan 16 & 19).

(3) Dengan penerangan jelas mengenai tanah tersebut di dalam perjanjian jual beli dan perisytiharan statutori defendan sendiri mengenai jualan tanah tersebut kepada plaintif pertama, pembelaan tersilap adalah rekaan semata-mata. Defendan tidak mengemukakan apa-apa keterangan yang boleh dipercayai untuk menunjukkan bahawa dia bertujuan untuk menjual tanah lain selain daripada tanah yang dipersoalkan, kepada plaintif pertama (lihat perenggan 15 & 17).]

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45, FC (refd)

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149; [2013] 6 CLJ 805, FC (refd)

Cheah Theam Kheng v City Centre Sdn Bhd (in Liquidation) & other appeals [2012] 1 MLJ 761; [2012] 2 CLJ 16, CA (refd)

Coastland Properties Pte Ltd v Lin Geok Choo [2001] 1 SLR 72, HC (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, HC (refd)

Patimah bt Leman v Jemin ak Longun [2010] MLJU 1348, HC (refd)

Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 1) [2011] 6 MLJ 111, CA (refd)

Legislation referred to

Evidence Act 1950 ss 40, 41, 42, 44

Sarawak Land Code (Cap 81) s 8

Specific Relief Act 1950 ss 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

Collin Lai (Lai & Co) for the plaintiffs.

Tony Ling (Nawi, Wong & Partners) for the defendant.

Rhodzariah Bujang J:

[1] The subject matter of this action is a piece of land situated in a small town called Tapah, in the district of Kuching. It was formerly described as Lot 1268, Block 14 Sentah Segu Land District and had an acreage of 9.829 hectares more or less. The defendant claimed beneficial ownership of the said land by reason of having native customary rights over it and had applied to the Lands and Surveys Department to be given the title to the said land, which application was approved in the said department's letter dated 9 August 2007. However when title was issued in respect of it, the defendant was given title to slightly more than half of the said land, described as Lot 1291, ie 5.90100 hectares, more or less whereas the remainder of the land was issued with another title,

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

Lot 1290 and the registered owner is the Government of the State of Sarawak. In other words, Lot 1290 is now state land and both lots are categorised as native area land in the print out of the titles.

[2] The first plaintiff is claiming specific performance of an agreement to buy Lot 1268 from the defendant which agreement was made on 19 May 2004, about three years before the issuance of the said title to the defendant but in their statement of claim, the first and second plaintiffs (who is his nominee), applied for the transfer of Lot 1291 to the second plaintiff together with other ancillary prayers in relation thereto.

[3] In his re-amended statement of defence, the defendant admitted entering into the sale and purchase agreement with the first plaintiff but contended that the subject matter of the said agreement is another piece of land — not Lot 1291 for he has earlier agreed to sell the said Lot 1291 to one Patimah bt Leman (see para 4 of the said pleading). He further denied receiving the full purchase price of RM102,200 from the plaintiff and in para 9 professed his willingness, given the mix up in the land to return the sum of RM30,000 which he acknowledged he had received from the plaintiff. In the last paragraph of his pleading the defendant pleaded that the sale and purchase agreement had been rescinded pursuant to cl 4(a) of the same which provides for its rescission in the event that the land is not alienated to the defendant within three years from the said agreement ie by 18 May 2007.

[4] At the trial of this action, a more nefarious web of deceit was revealed in respect of the defendant's dealing with the said Lot 1268. Two lawyers testified for the plaintiffs, Ms Colina Cheng Li Min ('PW2') and Ms Lo Fo Meng ('PW3') and their evidence showed that they have each represented the defendant and the intended purchasers for Lot 1268 and have prepared sale and purchase agreements as well as lodged caveats against Lot 1291 after the title to the said land was issued. Ms Lo Fo Meng's client, Mr Charles Jabu Ahat's sale and purchase agreement was dated 13 June 2003 and according to her, this Charles Jabu Ahat was a nominee for the real purchaser, a Mr Ho Meng Teck. The sale and purchase agreement for this transaction was not exhibited at the trial but the caveat was — at pp 41–42 of exh P2, the plaintiff's bundle of documents agreed as to authenticity at the trial. Ms Colina Chang's client was one Buan Lian Bana and the sale and purchase agreement dated 25 March 2004 was exhibited at pp 33–36 of exh P2 and the caveat at pp 30–31 of the same exhibit. This latter sale and purchase agreement, it is to be noted, was entered just less than two months before the agreement in this case. Then there is the sale of the said land to Patimah bt Leman and this merits a more elaborate mention in this judgment.

[5] I paused here, in my narration of the evidence, to remind myself that the

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

relief of specific performance of an agreement is both an equitable and discretionary remedy provided for in ss 11 to 29 of the Specific Relief Act 1950. Section 21 specifically states that the jurisdiction to grant it is discretionary and the court is not bound to grant it merely because it is lawful to do so although that discretion, to be exercised along judicial principles should not be arbitrary but sound and reasonable. Mr Tony Ling, for the defendant has, in his final submission in reply, quoted lengthy excepts from the decision of Choo Han Teck JC (as His Lordship then was) in *Coastland Properties Pte Ltd v Lin Geok Choo* [2001] 1 SLR 72 which basically said what has been legislated in those provisions and thus, do not merit any reproduction in my judgment.

SALE TO PATIMAH BT LEMAN

[6] It was vide an agreement dated 11 January 2003 (exh D1), entered about 16 months earlier than the agreement in this case and supplemented on 1 July 2008 (exh D1A). She filed a court action, also for specific performance of the agreement but after the plaintiffs here have filed theirs ie in Kuching Suit No 22–164 of 2009. A judgment in default (exh D5) was entered against the defendant on 15 September 2009 by the deputy registrar, which judgment was later regularised by Datuk Linton Albert J (as His Lordship then was) on 30 September 2010. The court order was tendered at the trial by the defendant as exh D4. The plaintiff in this action before me tried to intervene in that action of Patimah bt Leman but was not allowed. In his written submission at the conclusion of the trial, Mr Collin Lai for the plaintiffs submitted to me that the sale and purchase agreement with Patimah bt Leman cannot be used to impugn the validity of his client's agreement with the defendant because when the agreement with Patimah bt Leman was entered, the land title of the land was not with the defendant and the defendant admitted in his evidence that in actual fact the purchaser was one Penghulu Chai Heng Fui who was using Patimah bt Leman to buy this native land. He cited the Federal Court's decision in *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805 which held that sale of native customary rights land is prohibited unless it follows the Iban custom on the transfer of such land. It was also against s 8 of the Sarawak Land Code, said Mr Collin Lai which prohibits the transfer of native land to a non-native. In addition he also pointed out that in the sale and purchase agreement with Patimah bt Leman, the land is described as Lot 1291 and how it could be, he questioned when the land title to Lot 1291 was only issued on 21 May 2008. To that last point, the lawyer from the legal firm of Messrs Satem, Chai & Dominic Lai who prepared the agreement ie Mr Nyam Teck Chiew ('DW3') testified that the said description of the land was only inserted into it after the supplementary agreement (exh D1A) was signed on 1 July 2008 which explanation is reasonable and probable enough to me given the physical evidence of the agreements at the trial. As for the illegality of the sale and purchase agreement with Patimah bt Leman, I note the plaintiff's own case, as

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

testified and confirmed by the first plaintiff himself and Wong Ghee Toh @ Wong Chung Chung ('PW4'), that the purchase money in this case was paid by the said Wong Ghee Toh (or Datuk Wong as he was described by the first plaintiff in his evidence). Both witnesses in their witness statement did not explain at all why the purchase money had to come from Wong Ghee Toh. I refer to the evidence of the first plaintiff at p 56 of the notes of proceedings where the first plaintiff also said that the defendant borrowed money every month from Wong Ghee Toh. I could not, in the face of this evidence, discount the probability that the actual purchaser under that sale and purchase agreement of the first plaintiff and the defendant was in fact the said Wong Ghee Toh. However, putting aside this probability, what I cannot disregard is the court order giving Lot 1291 to Patimah bt Leman. It is trite law that a court order has the force of law until it is set aside as held by the Court of Appeal in *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) & other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16. As I said earlier, the plaintiffs have applied to intervene in Patimah bt Leman's case after the judgment in default was entered but was not allowed by Ravinthran a/l Paramaguru JC (as His Lordship then was) and the plaintiffs did not appeal against the dismissal of their application. The judgment of His Lordship is reported in *Patimah bt Leman v Jemin ak Longun* [2010] MLJU 1348.

[7] Mr Collin Lai submitted that because the defendant has failed to plead the judgment in default and the regularisation order, I should not consider them at all in my resolution of his clients' case. With respect, I am unable to accede to that argument. I concede that these court orders are material to the defence of the defendant against the claim for specific performance but being court orders, are not facts which must be pleaded but ones which I have to take judicial notice of especially when they are all captured in the court's computerisation system, the details of which are in the case's virtual file in the said system. The material fact which has been pleaded is the prior sale of the land to Patimah bt Leman (para 8 of the re-amended statement of defence) and the judgment in default and regularisation order, in my view, were evidence led in support of and to strengthen that defence.

[8] It is to be noted as well that the plaintiffs were not at all taken by surprise by these court orders, for as mentioned earlier, they attempted to intervene to set them aside but failed. Mr Collin Lai has submitted and I am aware of s 44 of the Evidence Act 1950 which provides that any party to a suit may show that a judgment, order or decree which is relevant under ss 40–42 of the said Act and which has been proved by the adverse party was, inter alia, obtained by fraud or collusion. But it is our law that the standard of proof for fraud in a civil case where there is a criminal element involved, such as cheating in this case, is beyond reasonable doubt (see the Federal Court case of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun,*

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

deceased) [1997] 2 MLJ 45). Such a standard was definitely not attained in this case. As for collusion, there only exists a suspicion of some underhand dealings between the defendant, Patimah bt Leman and *Penghulu* Chai Heng Fui as suggested in the cross-examination of the defendant at p 124 lines 1–7 of the notes of proceedings which I reproduced below:

PUT:	That you have knowingly allowed the judgment in default (ie Exhibit D5) to be entered against you. Do you agree with such a statement?
A:	I disagree.
PUT:	That you have knowingly allowed the regularization order (ie ID D4) to be made. Do you agree with such a statement?
A:	I cannot answer this question.

[9] However, such a suspicion is not strong enough as evidence of a collusion between the parties. What could have strengthen it would be if the said Patimah bt Leman had been brought in as a party to this proceeding or alternatively, a fresh action filed against her and/or the defendant herein based on the said s 44 because it would not be fair to put the court orders she obtained in her own action on trial in this action without giving her the opportunity of being heard. In other words and in my view, the said s 44 can only be invoked when the parties to that judgment are before the court.

[10] Mr Collin Lai further submitted that since his clients are not parties to the orders obtained by Patimah bt Leman, they are therefore not bound by them. Whilst I agree that his clients, not being parties in Patimah bt Leman's case can ignore these court orders with impugnity but I, on the other hand, have no such choice. Ignoring these valid and subsisting court orders would turn me into the proverbial ostrich that buries its head in the sand. Further, against Mr Collin Lai's submission in reply, I also cannot ignore the fact that it is the same piece of land that the court in Patimah bt Leman's case and I are concerned with even though the judgment in default in the former's case only mentioned Lot 1291 but not the full description of the land. I appreciate his citation of the Court of Appeal's case of *Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 1)* [2011] 6 MLJ 111 as stating the ratio that the court must not look at extrinsic evidence to resolve ambiguities in a judgment and that on the face of it a judgment must be clear enough to enable compliance. However, the facts in the cited case show that the party applying to set aside the unclear judgment in default was the defendant himself and the appellate court's examination of the statement of claim, which the Federal Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 held can be resorted to when faced with such ambiguity in a judgment, could not settle the uncertainty of the judgment in default obtained by the respondents in the said case. I faced no such handicap in this case to identify that it is the same Lot 1291 that the parties were fighting about. I have said at the onset of this judgment that specific performance is a discretionary relief and I make it clear now that it is

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

one which I am not prepared to exercise in favour of the plaintiffs because there is simply no room for two court orders ordering specific performance of the sale of one piece of land to two different persons to co-exist. Unless the judgment in default in Patimah bt Leman's case is set aside, I have to defer to it, there is just no two ways about that as it was made earlier in time.

AGREED ISSUES

[11] The parties at the trial before me has agreed to five issues for trial and the statement on these issues I have marked as exh P1A. The issues read as follows:

(a) Did the defendant, prior to the date of the agreement (as that expression is defined in paragraph 2 below), enter into a valid and legally binding agreement with a third party to sell to such third party the land referred to in the agreement, and if so, what are the legal implications arising therefrom vis-a-vis the plaintiffs?

(b) Did the defendant make a mistake when he entered into the agreement dated the 19th day of May, 2004 ('hereinafter referred to as the agreement') (a copy of which can be found on pages 1 to 6 of the plaintiffs' Bundle Of Documents dated the 17th day of October, 2013) ('hereinafter referred to as the PBOD') with the first plaintiff, and if so, what are the legal implications arising from such mistake vis-a-vis the plaintiffs?

(c) Did the defendant receive in full the consideration sum referred to in the agreement?

(d) Was the agreement revoked and rescinded pursuant to Clause 4(a) therein?

(e) In light of the foregoing and taking in account the evidence adduced in before the Honourable Court, are the plaintiffs entitled to the remedies set out in the Writ Of Summons and the statement of claim of the present action?

[12] On the considerations that I have made earlier (before reproducing the agreed issues), I would answer the first part of that first issue in the positive and as to the second part it is obvious from the said considerations that in the face of and given the existence of that earlier court judgment/order in favour of Patimah bt Leman, I could not grant the relief prayed by the plaintiff for specific performance of the sale and purchase agreement with the defendant. This conclusion takes care part of the fifth agreed issue and my next consideration of the evidence would be relevant to the remaining issues.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

A MISTAKE OF FACT

[13] I do not think the defendant has adduced any credible evidence to show that he meant to sell the first plaintiff any other piece of land other than the said Lot 1286. That is made clear enough in the sale and purchase agreement and the fact that when title was issued to him, he was not given the whole 9.829 hectares of it does not detract from the fact that it was that piece of land that he wanted to sell. The first plaintiff, knowing fully well that the plaintiff's ownership of the land at that material time of the execution of the agreement was only beneficial, not yet legal, obviously took a calculated risk by allowing, as the evidence shows, full payment for the purchase price to be made, and then some, against the express clause on it (cl 2(b) of the agreement) even before the land title was issued and not making the payment through their lawyer, Mr Lai Peng Seng ('PW7'). The payment cll 2(a) and (b) provide as follows:

> 2. The purchase price for the said Land is in the sum of *RINGGIT MALAYSIA SEVEN THOUSAND ONLY (RM7,000.00) PER ACRE* which shall be paid by the Purchaser to the Vendor as follows:
>
> (a) a sum of RINGGIT MALAYSIA TWENTY THOUSAND ONLY (RM20,000.00) is paid by the Purchaser to the Vendor upon the signing hereof, the receipt of which sum is hereby acknowledged by the Vendor;
>
> (b) the balance of the purchase price shall be paid by the Purchaser to the Vendor within TWO (2) months after the Vendor informs the Purchaser in writing and it is a fact that the individual title to the said Land has been issued by the Land Office and title obtained therefrom WHEREUPON the Vendor shall transfer or cause to be transferred the said Land to the Purchaser and/or his nominee(s).

[14] Then in his cross-examination (p 98, lines 18–20 of the notes of proceedings), the defendant said he wanted to sell *that part of the land* which is now Lot 1290, ie the state land to the first plaintiff. This is further re-emphasised when he agreed with Mr Collin Lai's question (at p 99, lines 1–3) that he wanted to sell Lot 1290 to the first plaintiff. I reproduce the said evidence in verbatim below:

> Q: Do you agree with me that you intended to sell Lot 1291 to Patimah bt Leman and Lot 1290 to the first plaintiff?
>
> A: Yes.

[15] Be that as it may, given the clear description of the land and the defendant's own statutory declaration pertaining to the sale of the land to the first plaintiff (exh P1) I say with full conviction that the defence of mistake as pleaded in para 4 of the statement of defence is pure fabrication because at the time when the sale and purchase agreement with the first plaintiff and Patimah bt Leman were signed there were no Lots 1290 and 1291 — only Lot 1286.

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

And both the sale and purchase agreements with them did not qualify that the sale was only in respect of part of Lot 1286.

[16] I also find credible evidence to support that a sum of RM128,750, not just the full purchase price of RM102,200 have been paid to the defendant as evidenced by two receipts and 13 payment vouchers (exhs P5A and B and exh P6(A) to (M), respectively) which the defendant admitted signing but said he was forced to sign *all* the receipts and payment vouchers and threatened by Wong Ghee Toh to do so. Yet despite that allegation of threat and coercion, he was willing to return the deposit of RM30,000 as testified by him in re-examination at p 129, line 14–16 of the notes of proceedings which stand was reiterated by Mr Tony Ling in his final submission. What is more telling against the genuiness of this allegation is that he did not lodge any report of the alleged threat and coercion. His police report (exh D3) made on 16 April 2009 only complained about being stalked by someone in a car and that was about five months after he signed a statutory declaration, exh P3 to say that he has received the full purchase price of RM102,200 from Wong Ghee Toh.

[17] The commissioner for oath, before whom the statutory declaration was signed on 4 November 2008, Mr Mousey Chundi ('PW1') testified that he explained its content to the defendant in simple local Malay although the defendant understood English. I do not think that it lies in the defendant's mouth to dispute the understanding of the declaration he has made and I take cognizance of the fact that has deposed affidavits in an interlocutory application before me in English in this same case without any need for translation. The denial of ever receiving the full purchase price from the first plaintiff was clearly made without any basis. Thus, the third agreed issue is answered in the affirmative.

[18] Adding to my consideration of his inconsistent stand on the receipt of the full purchase price was his flat denial of having agreed to sell the same land to the two other purchasers Buan Lian Bana and Charles Jabu Ahat, whom I have mentioned earlier. He branded the two lawyers acting for the said purchasers (and for him) in the transactions as liars when the documents evidencing the sale and purchase of the land were admitted as to authenticity at the trial and appeared at pp 33–36 and 41–42 of exh P2. I want to now say that in the face of all these oral and documentary evidence, it was he who was not being truthful.

RESCISSION OF THE AGREEMENT

[19] Although cl 4(a) provides that the agreement is to be rescinded if the land is not alienated to the defendant within three years from the date of the sale and purchase agreement or such extended time as agreed by the parties (no

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

A evidence of such extension has been adduced at the trial), nevertheless there is a condition stated in the said clause which is that the defendant 'shall refund to the purchaser all sum(s) of money received ...'. The defendant obviously did not do so and not having complied with his own obligation under the said clause, he should not be allowed to now turn around and plead rescission of the
B agreement as a defence. The fourth agreed issue is therefore answered in the negative ie the agreement was not rescinded.

RESTITUTION

C **[20]** What the defendant did, selling the said land to multiple buyers was nothing short of despicable and equally, no less disgusting, but given that specific performance of the agreement is out of the question and likewise the ancillary prayers in relation thereto which I need not repeat further, the only
D restitution which I can give the plaintiffs, in particular the first plaintiff, is prayer (f) of the statement of claim which is the prayer for damages for breach of the agreement which was prayed 'in lieu of or in addition to specific performance of the said agreement'. Mr Collin Lai, however, did not address me on this alternative prayer on damages. In spite of that and the defendant's
E own admission made when cross-examined by Mr Collin Lai that he would not be in the position to pay 'compensatory damages in the sum of RM80,000.00' to the plaintiffs if ordered by the court (see p 124, line 13–16 of the notes of proceedings), I have no alternative and I am constrained to order what I think is fair in this case, which is, that the defendant refund the sum of RM128,750
F he had received from the first plaintiff through Wong Ghee Toh with interest at 5%pa from the date of the service of the writ of summons and statement of claim until full and final settlement of the same. I take no comfort from the knowledge that given the admitted impecuniosity of the defendant, the plaintiffs may be left clutching at straws and holding a paper judgment but
G there is only so much that the court can do in the face of the earlier judgment given to Patimah bt Leman and when the first plaintiff had opted to pay, as I mentioned earlier, the full purchase price (and more) without following the safeguard as contained in the payment cl 2(b) of the agreement.

H **[21]** One last matter need to be clarified before I conclude this judgment. It is that the Mr Tony Ling was ordered, at the commencement of the trial to recompile their one bundle of documents tendered at the trial to reflect those documents which have been agreed as to authenticity and those which were
I disputed. Mr Tony Ling did not do so until the day fixed for submissions after the trial has concluded. Meanwhile at the trial, the defendant's documentary exhibits were tendered and marked separately. They remained so and in this judgment I have referred to them according to their exhibit numbers and not by the separate (and the much delayed) bundle of documents.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Sep 18 14:13:57 2014

[22] In addition, I also order that the defendant pay the plaintiffs costs of the trial which I fixed at RM30,000.

Claim dismissed.

Reported by Ashok Kumar